In The

Supreme Court of the United States

October Term, 1977
No. 77-234

RICHARD E. SPENCER, APPELLANT,
v.
LORRAINE B. SPENCER, ET AL., APPELLEES

Appeal from the United States District Court
for the Middle District of North Carolina

MOTION TO DISMISS OR AFFIRM JUDGMENT

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Pursuant to Rule 16 (1) (c) of the rules of this Court, the State officials who are Appellees in this action move the Court to affirm the judgment of the United States District Court for the Middle District of North Carolina, on the grounds that it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument.

In the alternative, pursuant to Rule 16 (1) (d) of the rules of this Court, these Appellees move the Court to dismiss the appeal from the judgment of the United States District Court for the Middle District of North Carolina, on the grounds that the statute sought to be declared unconstitutional has been repealed effective January 1, 1978, and the issue as to whether an injunction should be entered against these Appellees will become moot at that time.

STATEMENT

On April 5, 1976, Richard E. Spencer brought suit in the United States District Court for the Middle District of North Carolina against his former wife, Lorraine B. Spencer, and against the Governor, the Attorney General and all of the judges and clerks and magistrates of North Carolina, claiming that his constitutional rights were violated by the implementation of the North Carolina privy examination statute, which provided that, at the time of the execution of a separation agreement, a wife would be given a privy examination by a judicial officer to determine if the separation agreement was unreasonable or injurious to her, but which provided no such privy examination for a husband. In this action Richard E. Spencer sought injunctive and declaratory relief from the enforcement of the privy examination statute (G. S. 52-6); "that the court declare the rights of the parties to the separation agreement, and further, that the court restrain the enforcemen of the separation agreement against the plaintiff. Additionally, the plaintiff demanded that the court declare the separation agreement void or, in the alternative, require that he be given a privy examination prior to the enforcement of the separation agreement." See Opinion of the District Court, page 15.

On April 6, 1976, Lorraine B. Spencer brought suit against Richard E. Spencer in the General Court of Justice of Guilford County, North Carolina, District Court Division. The allegations in this State action involve the enforcement of the separation agreement executed by Richard E. Spencer and Lorraine B. Spencer on June 7, 1960, and are identical to the counterclaim filed by Lorraine B. Spencer in the action filed in the United States District Court by Richard E. Spencer.

Affidavits filed in the action in the United States District Court indicate that the attorney for Appellee Lorraine B. Spencer, Mr. Norman B. Smith, had, on March 10 and March 22, 1976, prior to the filing of either action, informed the

attorney for Appellant Richard E. Spencer, Mr. Welsh Jordan, of his intention of bringing an action on behalf of Lorraine B. Spencer against Richard E. Spencer to enforce her alimony rights under the separation agreement. Mr. Jordan, according to the affidavit of Mr. Smith, asked on each occasion that the filing of this suit be delayed in order that the matter might be settled by agreement. On April 5, 1976, Mr. Jordan informed Mr. Smith of the filing of the action in the United States District Court, whereupon Mr. Smith filed the State action.

On April 29, 1977, the opinion of the three-judge court was filed. In that opinion the District Court held that the principles of comity and federalism precluded the exercise of jurisdiction and dismissed the action.

On May 13, 1977, the North Carolina General Assembly ratified Chapter 375 of the 1977 Session Laws which repealed G. S. 52-6, effective January 1, 1978.

ARGUMENT

Appellees believe that the District Court did not err in dismissing the action on the grounds that principles of comity and federalism precluded the exercise of jurisdiction.

I.

THE QUESTIONS ON WHICH THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Appellant claims that the questions presented in this case are substantial because the decision of the District Court is contrary to decisions of this Court. The District Court held that principles of comity and federalism precluded the exercise of jurisdiction and accordingly dismissed the action. Appellant contends that, according to decisions of this Court, in order for abstention to be applied in a civil case the State must have a substantial interest in the litigation, citing *Huffman v. Pursue, Ltd.*, 420 U. S. 592 (1975); *Juidice v. Vail*, 45 U. S. L. W. 4269

(U. S. March 22, 1977); *Trainor v. Hernandez*, 45 U.S.L.W. 4535 (U. S. May 31, 1977).

Appellant further contends that no such substantial State interest exists in this action—that it is, instead, a "private controversy which involves the State only indirectly and tangentially."

Appellant has challenged the constitutionality of a State statute. If his challenge is allowed and if he is granted the relief he is seeking, untold numbers of deeds, contracts, conveyances, and leases executed between husbands and wives and now in effect in this State will be adversely affected. This, Appellees claim, involves the State more than indirectly and tangentially.

Appellant has made no attempt to distinguish his agreement or the manner in which it was executed from any other agreement executed in accordance with G. S. 52-6. He does not claim that the terms of the agreement were unreasonable or injurious to him. Nor does he claim that he entered into the agreement other than freely and voluntarily. (Indeed, the facts of the case disclose that it was Richard E. Spencer who sought the separation and that he signed the agreement upon the advice of his attorney, an attorney from the same firm which filed this action.)

Thus, if Richard Spencer's separation agreement executed in 1960 is declared void or if a privy examination is ordered for him, a cloud will be cast upon the validity of every deed, contract, conveyance and lease executed between a husband and wife in accordance with G. S. 52-6 since its enactment in 1871.

Appellees contend, therefore, that as State officials charged with the interpretation of North Carolina laws, among which are domestic relations laws, they have a vital interest in the outcome of this matter and that this interest is at least as substantial as the State interests which justified abstention in *Juidice* and *Trainor, supra*.

The decision of the District Court to dismiss the action was, therefore, correct and further argument is unnecessary.

II.

THE STATUTE SOUGHT TO BE DECLARED UNCONSTITUTIONAL HAS BEEN REPEALED AND THE OTHER QUESTIONS ON WHICH THE CAUSE DEPENDS ARE WITHOUT MERIT.

Appellant asserts that abstention is inappropriate in a case involving a statute which is "flagrantly and patently violative of express constitutional prohibitions." N.C.G.S. 52-12 (now 52-6), Appellant contends, is such a statute. On May 13, 1977, the North Carolina General Assembly repealed G. S. 52-6, effective January 1, 1978. The new statute provides no privy examination for either party.

The terms of Appellant's separation agreement were agreed upon before the privy examination of his wife was conducted, and none of these terms were changed as a result of the examination. While discriminatory, the statute was, in reality, merely a formality and it is difficult to imagine how this statute could have in fact flagrantly and patently violated Appellant's constitutional rights.

Since no such showing is offered by Appellant, Appellees contend that the repeal of G. S. 52-6 should moot this action.

CONCLUSION

Appellees respectfully submit that the District Court did not err in dismissing this action. The State interests involved are substantial and the statute sought to be declared unconstitutional has been repealed. In such a case, abstention is proper.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-76-163-G

RICHARD E. SPENCER, Plaintiff,	)	
v.	)	**AFFIDAVIT OF NORMAN B. SMITH**
LORRAINE SPENCER,	)	
Defendant.	)	

Norman B. Smith, being first duly sworn, deposes and says:

1. My name is Norman B. Smith, and I am the attorney of record for defendant Lorraine Spencer in the above-entitled action.

2. On April 6, 1976, the day following the commencement of this action, defendant Lorraine Spencer commenced an action against plaintiff Richard Spencer in the Greensboro District Court Division of the Guilford County General Court of Justice. The allegations of the complaint in that action are identical to the allegations of the counterclaim in the case at bar; the allegations in the counterclaim in that action are virtually identical to the allegations of the complaint in the case at bar.

3. In early March, 1976, the undersigned had the complaint and summons ready to file in the state court action. On March 10, 1976, the undersigned called plaintiff's attorney Welch Jordan on the telephone, and told him of defendant Lorraine Spencer's intention to file the lawsuit. Mr. Jordan requested that the undersigned delay filing the action, saying that he and his client wanted to discuss the matter and that possibly something could be worked out. The undersigned yielded to this re-

quest. On March 22, 1976, the undersigned again called Mr. Jordan and asked him what progress was being made toward settling the controversy. Mr. Jordan responded he needed a few more days and that he would get back in touch with the undersigned soon. Again, the undersigned extended the countesy to Mr. Jordan of delaying the filing of this action. On April 5, 1976, Mr. Jordan called the undersigned and said, "We have Pearl Harbored you! We filed a complaint in the United States District Court today suing your client, all of the judges, clerks and magistrates in North Carolina, claiming that the statute requiring a privy exam for wives is unconstitutional." After receiving this information, the undersigned filed the state action on April 6, 1976.

4. The undersigned calendared the state court action for trial during the sessions of June 1, 1976; July 6, 1976; the first nonjury session in September, 1976; September 27, 1976; and October 25, 1976. Until the October 25 session, the illness and later the death of the plaintiff's principal attorney Welch Jordan were successfully claimed by opposing counsel as reasons for continuing the case. At the October 25, 1976, session, the judge heard plaintiff Richard Spencer's motion to stay that case pending the outcome of the case in federal court. The order denying the stay was verbally announced by the state court district judge during the October 25 session, and an order was submitted by the undersigned during that same week; however, opposing counsel was successful in delaying the signing of the order by offering various objections to it and finally by offering a substitute order, so that the order was not entered until December 3, 1976. On December 7, 1976, the undersigned filed a calendar request asking that the action be tried during the week of December 27, 1976. Opposing counsel arranged for the case to be removed from the calendar for that session. Plaintiff Richard Spencer filed a petition for writ of certiorari in the North Carolina Court of Appeals seeking to review the order of the state district court denying stay. Petition for writ of certiorari was denied by the North Carolina Court of Appeals

on December 29, 1976.

5. It is the intent of the undersigned, as directed by his client, to bring the case in state district court to trial at the earliest possible time.

6. Attached hereto as Exhibits A through E, respectively, are the state court complaint, answer counterclaim, order denying stay, petition for certiorari, and order denying petition for certiorari.

s/Norman B. Smith
Affiant "[Duly notarized]"

CERTIFICATE OF SERVICE

I, Norman B. Smith, attorney for defendant Lorraine Spencer in the above-entitled action, do hereby certify that I have served a copy of the foregoing Affidavit of Norman B. Smith on opposing counsel of record at the last address known to me, by placing said document in an envelope with first-class postage affixed, and by depositing said envelope in the United States post office in Greensboro, North Carolina, this 17 day of January, 1977, said envelope being addressed as follows:

Ms. Janet L. Covey
Attorney-at-Law
426 W. Friendly Avenue
Greensboro, N. C. 27401

Ms. Ann Reed
Assistant Attorney General
Department of Justice
P.O. Box 629
Raleigh, N. C. 27602

Norman B. Smith

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1977
RATIFIED BILL
Chapter 375
House Bill 25

AN ACT TO REPEAL G.S. 52-6 RELATING TO THE PRIVATE EXAMINATION OF MARRIED WOMEN AND TO MAKE CONFORMING CHANGES IN RELATED STATUTES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 52-6 is repealed.

Sec. 2. G.S. 52-10 is rewritten to read as follows:

"§ 52-10. *Contracts between husband and wife generally; releases.*—(a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife."

Sec. 3. G.S. 52-10.1 is rewritten to read as follows:

"§ 52-10.1. *Separation agreements.*—Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife."

Sec. 4. G.S. 7A-292(10), as it appears in the 1975 Cumulative Supplement to 1969 Replacement Volume 1B of the General Statutes, is amended by deleting the following: ", and to make a private examination of the wife, as provided in G.S. 52-6".

Sec. 5. G.S. 10-5(a) (1), as it appears in the 1975 Cumulative Supplement to 1969 Replacement Volume 1B, is rewritten to read as follows:

"(1) Take and certify the acknowledgment of a contract, release, or separation agreement between a husband or wife as prescribed by the provisions of G.S. 52-10 or G.S. 52-10.1, and take and certify the acknowledgment or proof of the execution or signing of any other instrument or writing;".

Sec. 6. G.S. 29-19(b), as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended in the para-

graph designated (2) by deleting the language "G.S. 52-6 (c)" and substituting therefor the language "G.S. 52-10 (b)".

Sec. 7. G.S. 39-12, as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended on line 5 by deleting the language "G.S.-6" and substituting therefor the language "G.S. 52-10 or G.S. 52-10.1".

Sec. 8. G.S. 39-13.2 (b), as it appears in 1976 Replacement Volume 2A of the General Statutes, is rewritten to read as follows:

"(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-10 or G.S. 52-10.1 whenever applicable."

Sec. 9. G.S. 39-13.3 (e), as it appears in 1976 Replacement Volume 2A of the General Statutes, is rewritten to read as follows:

"(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or G.S. 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary."

Sec. 10. G.S. 39-13.4, as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended in the last sentence of the section by deleting the language "G.S. 52-6 with respect to a certificate of private examination of the wife" and substituting therefor the following: "the provisions of G.S. 52-10 or G.S. 52-10.1".

Sec. 11. G.S. 39-13.5, as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended in the paragraph numbered (1) immediately after the words "clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that" by deleting the remaining language of that numbered paragraph and substituting therefor the following: "the deed or deeds to such tenant in common and his or her spouse is signed by such

tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10;".

G.S. 39-13.5 is further amended in the paragraph numbered (2) immediately after the language "shall be owned by them as tenants by the entirety" by deleting the remaining language of that numbered paragraph and substituting therefor a period.

Sec. 12. The following amendments are hereby made to Chapter 47 as it appears in 1976 Replacement Volume 2A of the General Statutes:

a. G.S. 47-3 is amended on lines 6 and 7 by deleting the language ", and said commissioner may likewise take the acknowledgment and take such proof as to a married woman".

b. G.S. 47-5 is amended on line 3 by deleting the words "married woman or other".

c. G.S. 47-9 is amended on lines 1 and 2 by deleting the language ", including the privy examination of any married woman,"; G.S. 47-9 is further amended on line 5 by deleting the language ", proof or privy examination," and substituting therefor the words "or proof"; and, G.S. 47-9 is further amended on lines 7 and 8 by deleting the language ", proofs and privy examinations" and substituting therefor the words "or proofs".

d. G.S. 47-12 is amended on line 8 by deleting the language "G.S. 52-12" and substituting therefor the language "G.S. 52-10 or G.S. 52-10.1".

e. G.S. 47-12.1 (b) is amended by deleting the language "G.S. 52-12" and substituting therefor the language "G.S. 52-10 or G.S. 52-10.1".

f. G.S. 47-13 is amended on line 6 by deleting the word "women" and substituting therefor the word "persons".

g. G.S. 47-38 is amended on lines 2 and 3 by deleting the language "or where a married woman is a grantor or maker,".

Sec. 13. G.S. 52-2, as it appears in 1976 Replacement Volume

2A of the General Statutes, is amended on line 1 by deleting the language "G.S. 52-6" and substituting therefor the language "G.S. 52-10 or G.S. 52-10.1".

Sec. 14. G.S. 52-9, as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended on line 9 by deleting the following: "May 1, 1958, whichever date is later" and substituting therefor the following: "January 1, 1978, whichever date is earlier".

Sec. 15. G.S. 52-8, as it appears in 1976 Replacement Volume 2A of the General Statutes, is amended on lines 2 and 3 by deleting the language "December 31, 1974" and substituting therefor the language "January 1, 1978".

Sec. 16. The following sections of the General Statutes are repealed: G.S. 39-10 and G.S. 47-39.

Sec. 17. This act shall become effective on January 1, 1978, and no provision of this act shall affect pending litigation.

In the General Assembly read three times and ratified, this the 13th day of May, 1977.

James C. Green
President of the Senate

Carl J. Stewart, Jr.
Speaker of the House of Representatives

OPINION OF THE COURT

GORDON, Chief Judge

This three-judge court was convened to consider the claims of Richard E. Spencer that his constitutional rights were violated by the implementation of the North Carolina privy examination statute. The plaintiff contends that he was denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution inasmuch as the privy examination statute provided his wife with a private examination by a judicial officer to determine that the separation agreement entered into between the plaintiff and his wife was not unreasonable or injurious to the wife while, at the same time, the statute denied the plaintiff the same detached determination by a judicial officer as to the reasonableness of the separation agreement as it pertained to him.

On April 5, 1976, the plaintiff instituted this action, with a request that it be maintained as a class action, seeking injunctive and declaratory relief from the enforcement of N.C. Gen. Stat. § 52-6; that the Court declare the rights of the parties to the separation agreement, and further, that the court restrain the enforcement of the separation agreement against the plaintiff. Additionally, the plaintiff demanded that the court declare the separation agreement void or, in the alternative, require that he be given a privy examination prior to the enforcement of the separation agreement.

The plaintiff is an adult male who was married to the defendant Lorraine Spencer on September 12, 1942. Thereafter, the plaintiff and the defendant lived together as husband and wife until August of 1959, at which time they separated. On June 7, 1960, the plaintiff and the defendant Lorraine Spencer entered into a separation agreement which was executed in compliance with the provisions of N.C. Gen. Stat. § 52-6.

In accordance with the provisions of the statute, the defendant Lorraine Spencer was given a privy examination at the

time the separation agreement was executed. An Assistant Clerk of the Superior Court of Guilford County, North Carolina, privately examined the plaintiff's wife concerning the execution of the separation agreement. The Assistant Clerk certified that the defendant stated that she signed the agreement freely and voluntarily, without fear and compulsion of her husband or any other person. The Clerk then certified that the agreement was not unreasonable or injurious to her.

No privy examination was given to the plaintiff Richard Spencer in connection with the execution of the separation agreement, and there was no certification by any officer of the court that such agreement was not unreasonable or injurious to him. The statute did not make provision for such an examination of the husband, nor were there any other statutory provisions requiring or permitting a privy examination for male persons.

The defendant Lorraine Spencer has on occasions threatened action in the State Courts of North Carolina presided over by the defendant Judges for enforcement of the provisions of the separation agreement executed without a privy examination for the plaintiff. Furthermore, the predecessors of the defendant Judges have, acting under color of state law, enforced the separation agreement against the plaintiff. Specifically, on May 25, 1962, judgment was rendered against the plaintiff in the Municipal County Court in the amount of $700.00, which sum represented the arrears in payments under the separation agreement as of that time.

This cause was originally set for oral argument on January 31, 1977. Fourteen days prior to the time of the original hearing date, the defendant Lorraine Spencer filed a motion to dismiss or stay this action upon the grounds announced in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971). In this motion certain facts were first brought to the Court's attention which could have eliminated the necessity for much of the work already performed by the parties and

the Court. In her motion, Lorraine Spencer set forth facts indicating that on April 6, 1976, the day following the commencement of this action, she filed an action against the plaintiff in the District Court Division of the Guilford County General Court of Justice. The allegations of the complaint in that action are identical to the allegations of the counterclaim in the case at bar; and the allegations of the counterclaim in the State case are virtually identical to the allegations of the complaint in this action.

From these facts the defendant Lorraine Spencer contends that she is entitled to a dismissal of this action on the relevant principles of equity, comity, and federalism enunciated in *Younger*.

A resolution of the serious constitutional questions presented in this case are unnecesesary if this Court concludes that it would be inappropriate to hear and determine this matter. The pendency of a similar action in the state courts of North Carolina requires a resolution of the conflicting principles of equity, comity, and federalism with the maintenance of this federal action.

Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try cases free from interference by federal courts. The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *Younger, supra* at 43. In addition, general notions of comity, equity and federalism support the public policy against federal interference with state proceedings. This policy arises out of the courts' manifest desire to permit state courts to try cases free from interference by the federal courts.

These general notions of equity, comity and federalism, applied since the early days of our union of States and most recently in *Younger*, occupy a highly important place in our history and future. Their application should never be made to turn on such labels as "civil" or "criminal." Consequently, these principles apply equally to both civil and criminal actions pending in state courts. *Juidice v. Vail*, 20 Crim. L.R. 3077 (U.S. March 22, 1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975); *Lynch v. Snepp*, 472 F.2d 769, 773 (4th Cir. 1973).

It goes without saying that the principles of equity, comity and federalism have little force in the absence of a pending state proceeding. *Steffel v. Thompson*, 415 U.S. 452, 39 L.Ed.2d 505, 94 S.Ct. 1209 (1974). The seriousness of federal interference with state civil functions, particularly where the party to the federal case may fully litigate his claim before the state court, mandates that this Court not trivialize the principles of equity, comity and federalism by a strict adherence to the requirement that there must have been a pending state action *prior* to the date of the filing of the federal action. Therefore, where state proceedings are begun against the federal plaintiff after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* and *Huffman* should apply with full force. *Hicks v. Miranda*, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975).

The principles enunciated above mandate that this Court should stay its hand in the resolution of this matter. Clearly, the state action was filed prior to the time any proceedings of substance had taken place in this Court inasmuch as the state action was filed just one day after the filing of this action. Moreover, it is also clear that the state action has been calendared for trial on several different occasions only to be continued at the insistence of the federal plaintiff. Therefore, there can be no question that the plaintiff will have a full and

prompt hearing on the merits of his claim in the state courts.

In keeping with the letter and spirit of the *Younger* and *Huffman* decisions, this Court should not deny the courts of North Carolina the right to pass on the constitutionality of the statute. Moreover, even after this matter has been fully litigated in the state courts, the plaintiff will still have certain recourse for appeal within the federal system. 28 U.S.C. § 1257(2).

In addition to the reasons previously stated, the Court concludes that the plaintiff has failed to establish even a minimal showing that he will suffer immediate and irreparable harm sufficient to justify this Court interfering with a pending state proceeding. Moreover, the Court can perceive of no harm that will befall the plaintiff from pursuing his claims in the state courts. To allow this case to continue in this forum would result in the maintenance of two lawsuits involving the same parties, the same subject matter, and the duplication of much time and energy on the part of the Courts. Therefore, in order to avoid a useless conflict between this Court and the state court addressing the very same issues as presented in this action, the Court concludes that the only appropriate action which can be taken at this time is the prompt dismissal of the plaintiff's action.

The Court denies the plaintiff's request for class action status in the maintenance of this suit. This ruling will in no way effect the rights of the other members of the purported class the plaintiff seeks to represent.

During the course of oral argument counsel for the state defendants called the Court's attention to N.C. Gen. Stat. § 52-8.[2] At that time counsel and the Court observed that this

[2]N.C. Gen. Stat. § 52-8. *Validation of contracts between husband and wife where wife is not privately examined.*—Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930 and December 31, 1974, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation.

statute might render the plaintiff's federal claims moot. Section 52-8, N.C. Gen. Stat., on its face, appears to validate all agreements entered into between January 1, 1931, and December 31, 1974, which were not executed in accordance with the provisions of N.C. Gen. Stat. § 52-8.

In view of the Court's prior holding that this matter should proceed in the state courts rather than in this forum, the Court will not launch into an extended exposition on this statute's effect upon this controversey. However, in light of the defendants' position that this statute moots the present controversy, the Court feels obligated to comment upon the state defendants' position concerning this statute.

It is the defendants' contention that, inasmuch as the statute purports to deprive the plaintiff's wife of the opportunity to have the agreement declared void on the grounds of noncompliance with the statute, that it would follow that the plaintiff cannot have the agreement voided, because to allow such a result would impose upon the plaintiff greater rights under the statute than were conferred upon the wife as a result of the operation of the statute. Accordingly, so the defendants' argument goes, any defect in the separation agreement arising out of the operation of the privy examination statute has been cured by this particular piece of legislation.

The Court has examined the statute and the cases dealing with its application. The statute, by its express terms, deals only with contracts between a husband and wife which are "in all other respects regular." The only case law in North Carolina bearing upon the interpretation given to the above-quoted language appears in *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849, 856 (1970), and *Boone v. Brown*, 11 N.C. App. 355, 181 S.E.2d 157, 159 (1971).

Boone involved a special proceeding to sell a house and lot on petition for partition. In *Boone* the wife's deed was not acknowledged in accordance with the provisions of N.C. Gen.

Stat. § 52-6. No private examination of the wife was made as required by G.S. § 52-6(a); the certifying officer did not incorporate in her certificate a statement of her conclusions and findings of fact as to whether or not the deed was unreasonable or injurious to the wife as required by G.S. § 52-6(b); and the certifying official who took the wife's acknowledgment was a notary public and as such was not one of the officials authorized by G.S. § 52-6(c) to make the required certificate. The court held that G.S. § 52-8 was not applicable to this case. The court stated that, ". . . unless the requirements of the statute are complied with, such deed is void." *Boone*, *supra* at 158.

The Court in *Boone* commented that N.C. Gen. Stat. § 52-8 applies to only those contracts which are in all other respects regular. The failure of the wife to be privately examined and for the certifying officer to make appropriate findings of fact rendered the contract outside the language of the statute as being "in all other respects regular." Accordingly, the court determined that the defect in the wife's acknowledgment was not cured by N.C. Gen Stat. § 52-8.

In *Mansour* the North Carolina Supreme Court placed a similar construction upon the statutory language "in all other respects regular." The court stated that the failure of the certifying officer to make findings of fact concerning the agreement took the contract out of the provisions of the curative statute. Additionally, the court noted that N.C. Gen. Stat. § 52-8 had been enacted subsequent to the execution of the contract and the vesting of rights thereunder. Commenting on the effect of the curative statute on a fully executed contract the court observed, "[A] void contract cannot be validated by a subsequent act, and the legislature has no power to pass acts affecting vested rights." *Mansour*, *supra* at 857.

Accordingly, the Court observes that N.C. Gen. Stat. § 52-8 and cases decided thereunder do not appear to support the argument the defendants press upon this court.

By way of summary, we hold that the pendency of an action

in state court involving these same parties and issues present in this action precludes this Court from exercising its jurisdiction to determine the plaintiff's federal claims presented in his complaint.[3]

We hold on the facts of the case that this Court should abstain from hearing this cause. We request that counsel for the defendants prepare and submit to counsel for plaintiff an appropriate judgment to be submitted thereafter to the Court.

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[3]When the Constitution was adopted, the common understanding was that the domestic relations of husband and wife were matters reserved to the States. *Popovici v. Agler*, 280 U.S. 379, 383 (1930); *Ex parte Burrus*, 136 U.S. 586, 593, 594 (1890); *Simms v. Simms*, 175 U.S. 162, 167 (1899). Although this proposition does not control the disposition of suits involving substantial federal questions, it does serve to focus the Court's attention on the propriety of allowing state courts an opportunity to rule on the constitutionality of legislation governing the relations between married persons residing within the State.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-76-163-G

RICHARD E. SPENCER, Plaintiff,	)	
v.	)	JUDGMENT
LORRAINE SPENCER, et. al., Defendants.	)	

In conformance with the opinion of the court filed on April 29, 1977, it is,

ORDERED, ADJUDGED, AND DECREED, that plaintiff's motion to proceed as a class action be and the same is hereby denied; the motion of defendant Lorraine Spencer to dismiss this action on the ground of the pendency of an action in the North Carolina state courts in which the claims presented here will be fully litigated, is allowed, and this action be and hereby is dismissed and plaintiff is taxed with the costs of this action.

This 19th day of May, 1977.

s/Eugene A. Gordon
United States
District Judge